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UNITED NATIONS CONFERENCE ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

FIRST COMMITTEE

SUMMARY RECORD OF THE 12th MEETING

Held at the Austria Center Vienna,
on Wednesday, 10 April 1991, at 2.30 p.m.

Chairman: Mr. BERAUDO (France)

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The meeting was called to order at 2.40 p.m.

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 9 (continued) (A/CONF.152/C.1/L.21, L.50)

1. The CHAIRMAN called attention to document A/CONF.152/C.1/L.21, submitted by the delegation of Spain. It was pointed out that the English version of draft article 9 used the expression "handed over to an operator". The Spanish delegation had suggested that the expression used should be "taken in charge by an operator", in order to bring the wording of the provision into line with the rest of the Convention, and particularly article 3.

2. The suggestion in document A/CONF.152/C.1/L.21 was referred to the Drafting Committee.

3. After a procedural discussion between the CHAIRMAN and Mr. FATHALLA (Observer, United Nations Environment Programme) concerning the admissibility of the proposal submitted by the United Nations Environment Programme (UNEP) in document A/CONF.152/C.1/L.50, Mr. RUSTAND (Sweden) and Mr. SOLIMAN (Egypt) formally endorsed the proposal for consideration by the Committee, without prejudice to the position they might take on the change for which the proposal called.

4. Mr. FATHALLA (Observer, United Nations Environment Programme) said that UNEP believed that article 9 as drafted failed to take certain international legal instruments into consideration, in particular the International Convention for the Safety of Life at Sea (SOLAS, 1974), the Hamburg Rules and the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. The instruments in question prohibited the transport, including the export, of dangerous goods unless they were marked, labelled or packed in accordance with various rules and regulations. Moreover the introductory wording of the article, as drafted by the Commission, did not take account of the fact that if the rules and regulations he had alluded to were not respected, the transport of dangerous goods could be considered illegal and treated accordingly.

5. According to the Commission's introductory wording, the operator was presumed not to know of the dangerous character of the goods in question; at the same time, he would be fully entitled under paragraph (a) of the article to take a number of radical measures, which included destroying the goods. UNEP viewed that entitlement with considerable misgivings: it would be technically very difficult for an operator ignorant of the nature of the dangerous goods to take the proper steps to deal with them, however lawful those steps might be. Indeed, his action might be counter-productive and even destructive, not only to the environment but also to himself and his property as an operator. That was why, under the UNEP proposal for paragraph (a), such steps were limited to precautionary ones, which must be taken in accordance with international or national rules and regulations.

6. In sum, UNEP was seeking to point to the existence of international as well as national rules and regulations concerning the handling of dangerous goods, proposing that they should govern the manner of dealing with such goods under article 9, and endeavouring thereby to secure the operator's respect for well-established principles whose aim was to protect not only the environment but also his own interests. UNEP fully understood that the principal objective of article 9 was to protect the operator by liberating him from any obligation to pay

(Mr. Fathalla, Observer, United Nations Environment Programme)

compensation for damage caused by his actions thereunder and by ensuring that he would be reimbursed for all costs incurred in so acting. That objective was left untouched in the UNEP proposal.

7. Mr. SOLIMAN (Egypt) supported the UNEP proposal.

8. Mr. ZHAO Chengbi (China) saw little difference in substance between the UNEP proposal and the Commission's draft. He understood the "international or domestic rules and regulations" referred to in the former to be subsumed under the expression "any law or regulation relating to dangerous goods applicable in the country where the goods are handed over" which appeared in the latter. On balance, his delegation preferred the Commission's text. He did, however, appreciate the more discretionary provision proposed by UNEP for paragraph (a). Operators of transport terminals functioned in many different ways and in many different geographical and other contexts; as had been pointed out, they were presumed to be ignorant of the nature of the dangerous goods, and yet entitled, in the Commission's draft, to take measures which might prove harmful to the environment or to property. The UNEP draft did not preclude such measures but merely diverted attention from them to precautions permitted by international or national rules or regulations, thereby strengthening the possibility of proper control.

9. Ms. SKOVBY (Denmark) suggested that the international instruments referred to by the observer for UNEP were of only limited relevance to the matter covered by article 9. She opted for the Commission's draft as being more specific and relevant to the concerns addressed in the article.

10. Mr. PAMBOU-TCHIVOUNDA (Gabon) suggested that UNEP's preoccupation with international rules and regulations might be accommodated in the Commission's draft if the introductory wording were amended to refer to any relevant law or regulation. What seemed to be an innovatory notion of compensation for damage resulting from precautions, mentioned in paragraph (a) of the UNEP text, might usefully be incorporated in paragraph (a) of the Commission's draft.

11. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) favoured the Commission's draft as far as the introductory wording was concerned.

12. Mr. FILIPOVIĆ ((Yugoslavia) said that the UNEP proposal, albeit interesting, addressed the issue from the point of view of international public law and was concerned with issues such as precautions, prevention and responsibility, while the principal purpose of the draft article was to cover the specific matters of compensation and liability. The wording of the UNEP proposal was, he believed, unsuitable for the Convention and he could not endorse it.

13. Mr. ILLESCAS (Spain) was also unable to approve the UNEP proposal. With regard to the introductory wording, the Commission's draft was both broader-based - since the laws or regulations it referred to could be either international or domestic - and more specific, in that they were clearly described as being those relating to dangerous goods. Moreover, with regard to paragraph (a), he submitted that most international or domestic rules and regulations on the subject of dangerous goods covered, by and large, all types of transport operators, and not merely operators of transport terminals. The introduction into the present draft Convention of direct references to instruments of wider scope could lead to difficulties, if only in treaty law, by inadvertently opening the door to looser interpretations of those instruments and consequent harm to their scope and application. His delegation preferred the Commission's text of paragraph (a), which had the merits of clarity, of specifically addressing the case of transport

(Mr. Illescas, Spain)

terminal operators, and of indicating what the operator could and must do in the case spelt out in the introductory wording. It offered the additional advantage of pointing to specific and lawful measures for dealing with the situation.

14. Mr. FALVEY (United States of America) favoured the existing text, for the reasons put forward by the previous speaker. While his delegation had great respect for the concerns of UNEP, it believed that the original text merely provided a special rule to deal with a limited set of circumstances that might confront the operator, enabling him to take certain precautionary actions, all in accordance with existing law, and subsequently to recover their cost. His delegation also thought, however, that there was a legitimate basis for concern that that special rule might be interpreted on some future occasion as the only rule governing dangerous goods in the custody of the operator of a transport terminal. He therefore suggested that the report of the Conference should include the essence of a report by UNCITRAL in its Yearbook, volume XX: 1989 (p. 17, para. 124), which made it clear that that was not the case. There were many other rules dealing with the terminal operator's right of recourse with respect to liabilities he might incur towards third persons as a result of having dangerous goods imposed on him and on his premises. The concerns of UNEP could be dealt with similarly, by expanding the appropriate paragraph in the Conference's own report so as to make it clear that the special rule did not pre-empt other rules and regulations, including those in international conventions, that dealt with the marking, labelling, packaging and disposal of dangerous goods, as well as those that might provide rights of recourse for protection against liability towards third persons harmed by those goods.

15. Mr. HORNBY (Canada) said that his delegation was inclined to support the proposal. He believed that the purpose of the rule in article 9 was to establish the notion, consistent with the various conventions on liability, that the operator of a transport terminal might take certain precautions when handling unmarked dangerous goods and that he was entitled to receive reimbursement for the costs so incurred. The article was not intended to set out rules for the handling of goods but was a renvoi to applicable national law or international law. The language proposed by UNEP met that purpose better, making it clear that the Convention was not establishing rules on the handling of dangerous goods but was restricted to the narrower question of liability and reimbursement. The proposed rewording established that the precautions were to be taken in accordance with international or national rules and regulations and were not necessarily limited to those listed in subparagraph (a) of article 9 as drafted by the Commission.

16. Mrs. PIAGGI DE VANOSSI (Argentina) said that her delegation would support the original text, for the reasons given by the representative of Spain.

17. The CHAIRMAN invited the Committee to vote first on the introductory wording of article 9 as proposed by UNEP in document A/CONF.152/C.1/L.50.

18. The proposal was rejected by 21 votes to 6 with 4 abstentions.

19. The CHAIRMAN invited the Committee to vote on subparagraph (a) of the UNEP proposal.

20. Subparagraph (a) was rejected by 19 votes to 9 with 2 abstentions.

21. The CHAIRMAN invited the Committee to vote on subparagraph (b) of the UNEP proposal.

22. Subparagraph (b) was rejected by 21 votes to 4 with 6 abstentions.

23. The proposal as a whole was rejected.

24. Mr. FATHALLA (Observer, United Nations Environment Programme) requested the Executive Secretary to read out a statement by the International Maritime Organization (IMO) on article 9 of the draft Convention. The statement had been given him for presentation to the Conference so that it could be reflected in its report.

25. Mr. BERGSTEN (Executive Secretary) read out the statement. It noted that, in accordance with chapter VII of the International Convention for the Safety of Life at Sea (SOLAS, 1974), the carriage of dangerous goods by sea was prohibited unless provisions incorporated in that Convention concerning the treatment of such goods were strictly observed; that since SOLAS had been ratified by 111 States, those provisions were legally enforceable world-wide; and that the minimum requirements for the transport of dangerous goods by all modes contained in the United Nations recommendations prepared by the United Nations Committee of Experts on the Transport of Dangerous Goods enjoyed similar universal acceptance. The statement added that no operator could be expected, in the light of that background, to take in charge dangerous goods that had not been properly documented, marked, packaged and labelled; that in the case of dangerous goods, the precautions to be taken related primarily to the moment at which the operator took the goods in charge; that precautions at that stage were decisive for consideration of the operator's liability or any exemption from that liability; that the introductory wording of draft article 9 did not seem to reflect that situation; and that the article also seemed to relate primarily to dangerous goods in packaged form and should perhaps be amended by the Committee to include the operator's handling of dangerous goods and substances in bulk.

26. The statement then pointed out that, although the draft Convention established the channelling of liability on the basis of damage caused to the goods, precautionary measures to be taken in respect of dangerous goods necessarily related to damage caused by the goods, not only to "any person or property" as specified in the draft Convention, but also to the environment; and that, while IMO was primarily concerned with pollution from vessels, the importance of avoiding pollution of the marine environment from land-based sources was frequently the subject of consultations between IMO and UNEP. The statement concluded by saying that, in that regard, the need for the operator to take emergency precautions to avoid not only damage to persons or property but also environmental damage which might occur as a result of the introduction of dangerous substances into the marine environment, as in the case of the leaking of such substances after the operator had taken them in charge, should be taken into account.

27. Mr. RUSTAND (Sweden), speaking in explanation of his vote, reiterated that his delegation had not endorsed the substance of the proposal but the right of the observer for UNEP to present it.

28. The CHAIRMAN said that article 9 had been approved without amendment, subject to the decision of the Drafting Committee on the proposal by Spain (A/CONF.152/C.1/L.21).

29. Article 9, as worded by the Commission, was referred to the Drafting Committee on that understanding.

Article 10 (A/CONF.152/C.1/L.15, L.16, L.54)

30. Mr. SCHROCK (Germany) introduced the first part of his delegation's proposal in document A/CONF.152/C.1/L.16, concerning the first sentence of article 10 (1). He noted that the Japanese Government had made a similar suggestion in paragraph 3 of its written comments on the draft Convention (A/CONF.152/7). Article 10 (1) provided a right of retention for the operator during the period of his responsibility. At its twenty-second session, UNCITRAL had adopted a proposal that, in substance, gave the operator a right of retention over the goods for the cost of services rendered after his period of responsibility, as defined in article 3, had expired. That decision had been reflected in detail in paragraph 126 of the report of UNCITRAL on the work of its twenty-second session (A/44/17), which stated that the proposal had been accepted and referred to the drafting group. That decision was embodied in substance in the first part of the German proposal. It had not been given effect by the drafting group, as the Commission had noted in paragraph 207 of the report. His delegation felt that the Conference should implement the decision and amend the draft Convention accordingly.

31. Mr. OCHIAI (Japan) said that his delegation supported the German proposal for article 10 (1).

32. Mr. RUSTAND (Sweden) said that the decision in question had been taken in response to a proposal from the delegations of Finland and Sweden. Paragraph 9 of his Government's written comments on the draft Convention (A/CONF.152/7/Add.1) also spelt out the failure to reflect it in the draft Convention. The text of article 10 (1) on which the Committee was to base its discussion should therefore be amended by the German proposal.

33. Ms. SISULA-TULOKAS (Finland), Mr. TARKO (Austria) and Mr. HORNBY (Canada) supported the German proposal for article 10 (1).

34. The CHAIRMAN said that the proposal was intended to cover the marginal period when the operator no longer had responsibility for the goods but still had them in his keeping. Storage fees, for example, might accrue after the time when the goods should have been collected by the person entitled to receive them.

35. Mr. FILIPOVIĆ (Yugoslavia) said that under the Yugoslav legal system the right of retention depended on the goods still being in the operator's hands. It should be made clear, therefore, that the addition of "and after" meant that the goods must still be in the operator's custody.

36. Mr. SCHROCK (Germany) said that it was implicit in the right of retention that the goods should be in the hands of the operator. He would hesitate to introduce the notion of "having in custody" since the Convention contained the general principle of "taking in charge". Personally, he would prefer to have the paragraph more closely related to article 3, an idea implicit in the conclusions reached on the subject by UNCITRAL at its twenty-second session.

37. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) said that his delegation preferred the text of the Commission's draft. The use of the term "after" might imply that there was no time limit to the right of retention. The operator could enter into a separate contract with regard to costs incurred after the goods had been placed at the disposal of the person entitled to receive them.

38. Mr. ROJANAPHRUK (Thailand) agreed with the representative of Yugoslavia that the right of retention had nothing to do with the period of responsibility. The

(Mr. Rojanaphruk, Thailand)

aim of the German proposal was to cover the entire period of custody by the operator, but the sentence as it stood did that anyway, since there could be no right of retention if there were no goods to be retained. He suggested that the first sentence of article 10 (1) should end with the words "in respect of the goods".

39. Mr. SOLIMAN (Egypt) observed that under article 10 (1) of the Commission's text the operator would have no special priority in exercising his right over the goods. He therefore supported the proposed amendment, which would strengthen the operator's right of retention.

40. Mr. AL-ZABEN (Saudi Arabia) said he would not object to the addition of the words "or after" to the first sentence of article 10 (1). According to article 3, however, the operator's period of responsibility began when he received the goods and ended when he delivered them to the customer. Who would be responsible if the goods were damaged after that?

41. Mr. SULEIMAN (Nigeria) welcomed the enhanced right of retention which the operator would enjoy under the German proposal.

42. Mr. LEBEDEV (Union of Soviet Socialist Republics) was reluctant to accept the proposed amendment. The addition of the words "or after" might create an imbalance among the respective rights and duties of the parties under the Convention. The extended period was undefined; it might be a week, a year or even more. Moreover, the period of the operator's responsibility was that defined in article 3; it ended when the operator placed the goods at the customer's disposal. However, under article 10 he might retain the goods subsequently. The term "retention" might have different meanings in different legal systems; it might be construed to mean either that the goods could be held in the same place, or that they could be held wherever they were. Also, the addition of the words "or after" to the first sentence might conflict with the second sentence of the paragraph, which referred to arrangements "extending" the operator's security in the goods. That term too might prove misleading if, as in Russian, it implied an extension in time. All in all, he felt that the proposed amendment would not effect any practical improvement in the relationship between the operator and the customer. Admittedly, the purpose of the amendment was to facilitate transport operations after the expiry of the operator's period of responsibility, but it was uncertain whether the contractual relationship between operator and customer would continue once the goods were no longer in the operator's charge.

43. Mr. RUSTAND (Sweden) was surprised by the objections voiced to the German proposal for article 10 (1), since it was not a true amendment to the text in document A/CONF.152/5 but simply a correction of it to bring it into line with the text approved by UNCITRAL in 1989. The origin of the present difficulty lay perhaps in the wording of article 3, which provided that the period of responsibility ended with the handing over of the goods to the customer or, alternatively, with them being placed at his disposal. The right of retention must of course cease either when the customer paid his debt to the operator or when the operator exercised his right under the applicable national law to sell the goods. But it would be inequitable if, when the customer came to collect the goods, the operator was obliged to surrender them without compensation for extra costs incurred because of delay imputable to the customer.

44. The CHAIRMAN said that in the French legal system the right of retention covered all costs incurred by keeping goods in storage.

45. Mr. WOOLLEY (Institute of International Containers Lessors), speaking at the invitation of the Chairman, asked the representative of Germany whether national law would govern the duty of care involved in services performed after the end of the operator's period of responsibility.

46. Mr. SCHROCK (Germany) confirmed that it would.

47. Mr. RAO (India) said that the German proposal for article 10 (1) was acceptable and he could support it. In the Indian legal system, the principle it enshrined was found in the contract of bailment: if the bailee rendered services associated with his duties in respect of the bailed goods, he was entitled, in the absence of a contractual provision to the contrary, to retain them until he had been duly reimbursed for those services. If the proposal was thought to be too open-ended, a provision might be added to the effect that the right of retention would cease when the operator was reimbursed for the costs and claims incurred. That would spell out an idea which was already implicit in the proposed amendment.

48. Mr. SCHROCK (Germany) said the existing text of the amendment was adequate for that purpose.

49. The CHAIRMAN said that the addition suggested by the representative of India might prove a useful clarification and could be added by the Drafting Committee. He invited the Committee to vote on the German proposal for article 10 (1) (A/CONF.152/C.1/L.16).

50. The proposal was adopted by 21 votes to 7, with 8 abstentions.

51. Mr. SCHROCK (Germany), introducing the proposal in document A/CONF.152/C.1/L.16 to delete paragraph 3 of article 10, observed that paragraphs 1 and 3 of the article dealt with different issues. Paragraph 1 introduced the notion of a right of retention of the goods, a right which would not necessarily entitle the holder to sell them unless national law so allowed. The first sentence of paragraph 3 appeared to state a rule of conflict of laws that the right to sell the goods was governed by the place where the goods were located; that at least was the interpretation given by members of the United States delegation in an article published in October 1990 in the Journal of Maritime Law and Commerce. During the preparatory work for the Conference it had been accepted that possible conflicts between the right of sale and any property rights of third parties in the goods should not be dealt with by the Convention. However, the second sentence of paragraph 3 excluded from the right of sale containers, pallets and similar articles of transport or packaging, thus apparently setting aside the conflict of laws rule. As a result the entire paragraph was somewhat obscure. On a literal construction of the second sentence, the conflictual rule in the first sentence would not apply, giving way instead to the general principles of private international law.

52. His Government had doubts about splitting up the conflict of laws rule as between different categories of goods. In the first sentence of the text a unified conflict of laws rule was laid down for movables in general, but was immediately followed by a provision implying that containers would be dealt with according to the applicable national law. It would be better not to include in the draft any provisions dealing with the property rights of third parties in the goods. All issues relating to the sale of goods and the rights of third parties in the goods should be dealt with by the applicable national law according to the general principles of private international law.

53. Mr. TARKO (Austria) supported the proposal to delete paragraph 3. The first sentence of the paragraph was not helpful; it merely stated a conflict of laws rule without any attempt at unification, whereas the purpose of the Convention was to unify the law on the subject. A mere reference to the law of the State where the goods were located added nothing and the sentence could well be deleted. As to the second sentence, it was not clear what was supposed to happen to containers, pallets and other articles of transport or packaging. Was the operator entitled to sell them? Was that question governed by national law, and if so by which national law? If the Committee decided to delete paragraph 3, it should also delete paragraph 4; without the paragraph about the right to sell the goods, there was no need to stipulate how the right was to be exercised.

54. Mr. SULEIMAN (Nigeria) said his delegation would support the proposal to delete paragraph 3 provided that the Convention nevertheless safeguarded the operator's right to sell all or part of the goods to defray his expenses.

55. Mr. FILIPOVIĆ (Yugoslavia) supported the German proposal to delete paragraph 3, for the reasons given by the sponsor.

56. Mr. WOOLLEY (Institute of International Container Lessors), speaking at the invitation of the Chairman, said that the German proposal would not materially affect the industry he represented. For the benefit of those who were unfamiliar with the container leasing industry, it would be useful to explain how the kind of provision in question had arisen.

57. The Institute of International Container Lessors was the trade association for the international container leasing industry and its comments on the draft Convention were contained in document A/CONF.152/7. To understand how the exception for containers, pallets or similar articles appeared in paragraph 3 of article 10, it was necessary to understand something of the business relationships involved. There were 6.2 million 20-foot equivalent units of containers in the world, permanently marked with the owner's code, which was registered with the International Container Bureau; in addition, each container had a number particular to it. Containers were permanent means of transport with an approximate life of 7-15 years. They were not goods in the general sense and were regulated by the customs convention on containers, which allowed containers to enter a country as an instrument of international traffic without payment of duty. Half of the world's containers were owned by leasing companies, the other half by ship lines; those owned by leasing companies were leased to and used by ship lines. They were leased for periods of a much shorter duration than their useful life, from two months to five years. While on lease to ship lines, the leasing company did not know where the containers were. When the container went on lease, it started from a depot where it had been stored; when it was returned to the leasing company it was returned to the depot. There were approximately 1,000 depots around the world and the relationships between depots and leasing companies and between depots and ship lines were regulated by contract. One of the Institute's concerns was that unless due care was taken, depots would be construed as terminals.

58. Its major concern, however, was where a ship line went bankrupt and left containers at a terminal. The Institute did not consider that the terminal should be able to sell the containers belonging to the leasing company and believed that under the laws of many countries represented at the Conference the terminal had the right of retention, but that that right did not necessarily give it the right of sale. Under some circumstances there might be a right of sale but usually only with a court order. The German proposal to delete paragraph 3 of article 10 would, as he understood it, put the issue back in paragraph 1, which gave the operator the

(Mr. Woolley, Institute of International Container Lessors)

right of retention of the goods, namely the containers with other goods in them. The national law would then apply as to what the nature of that right of retention was. While in many countries it was fairly clear, in the United States it would be confusing. Marginally, therefore, the Institute was in favour of retaining paragraph 3. That would allow a claim to be made, or the possibility of satisfying a claim by sale to the extent permitted by the law of the local State, except for containers, pallets or similar articles. It would also illustrate to a common law lawyer what was meant by the right of retention. In the absence of that provision, lawyers in countries like the United States were likely to wonder what the right of retention meant. The resulting situation would be very confusing. At present there were probably jurisdictions in the United States where there would be a right of sale and others where there might not. He had not seen any decisions that would confer a right of sale but there were some that would prevent one.

59. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) supported the German proposal to delete paragraph 3.

60. Mr. ZHAO Chengbi (China) said that in his delegation's view, the operator's right of retention and his right of sale were totally different legal notions, but they should be connected at a certain level. If the operator was given the right of retention only, and deprived of the right of sale, he would be unable to get proper compensation. That would cause considerable difficulties for operators and might even result in their bankruptcy. The law on the right of retention varied greatly from country to country and the draft Convention was intended to settle such conflicts of law and bring about some uniformity in the matter. The text as it stood took into account the operator's rights and interests and the differences between national laws. His delegation was therefore unable to support the German proposal to delete paragraph 3.

61. Mr. ROMAN (Belgium) said that his delegation fully understood the reasons for the proposal, but given that the Convention was intended to apply world-wide, it preferred to retain paragraph 3 for the sake of clarifying it.

62. Mr. RUSTAND (Sweden) said that the problem with the Convention was that it had very little unifying effect with regard to the right to sell the goods by referring to the applicable national law. The Swedish delegation would have preferred the Convention to contain rules that would have such an effect, but acknowledged that it was impossible to introduce them at such a late stage in the consideration of the Convention. Sweden had no problems with the second sentence of paragraph 3, as its own laws were adequate to cover the matter. However, it believed that from a strictly logical and legal point of view the whole of paragraph 3 might usefully be deleted and, as a consequential amendment, paragraph 4 as well.

63. Mr. ABASCAL (Mexico) said that his delegation preferred to retain the text as drafted by the Commission and did not agree that the first sentence of paragraph 3 failed to add anything to the Convention. The reference to the law of the State where the goods were located was a specific and important stipulation which helped to meet the objective of uniformity - something particularly useful in view of the differences between national laws, which the discussion had highlighted. Another reason for its retention, put forward by the representative of the Institute of International Container Lessors (IICL), was that it would make the Convention more acceptable generally. Finally, the paragraph expressly stated that the operator had the right to sell the goods even though that right was subject to the law of the State where the goods were located. That would make the Convention more

(Mr. Abascal, Mexico)

attractive to terminal operators because it would guarantee their rights more forcefully.

64. Mr. NAOR (Israel) supported the German proposal to delete article 10 (3). His delegation considered that paragraph 4 should also be deleted and requested Germany's opinion on that point.

65. Ms. ZAWITOSKI (United States of America) said that her delegation could not support Germany's proposal to delete paragraph 3, for the reasons stated by the representatives of China, Mexico and IICL. The first sentence of the paragraph did add something to the Convention as far as the United States was concerned, because her country had perhaps as many as 50 different laws regarding an operator's right to sell goods which he had retained. The United States delegation therefore considered that the force of a treaty provision was needed in order to give some uniformity to the laws within its own country, not to mention uniformity on a world scale.

66. Mr. FILIPOVIĆ (Yugoslavia) said that the problem really lay in the stipulation of a conflict of laws rule in paragraph 3, because if the Convention implied that for the right of sale the law was immaterial, the national law would have to apply and would not be affected by the international instrument. Where the right to sell existed, the most important issue was how the goods were to be sold, whether privately or publicly. As such matters could not be covered by the Convention, the deletion of paragraph 3 would eliminate the conflict of laws rule; it would not help to introduce a right of sale into a national law.

67. Mr. SCHROCK (Germany) said that the second sentence of paragraph 3 did not reflect a statement which had been made in the article in the Journal of Maritime Law and Commerce to which he had referred earlier, namely that UNCITRAL had agreed that containers already marked as being owned by third party lessors should not be subject to sale. The sentence simply stated that the preceding sentence did not apply.

68. Before the Committee voted on his delegation's proposal for article 10 (3), he wished to know what principle the Committee would be voting on: whether on the unified exclusion of the right of sale with respect to containers; or on the issue that with respect to containers the general conflict of laws rules should apply, and with respect to any other movables the unified conflict of laws rule, which referred to the place where the goods were located, should apply.

69. The CHAIRMAN said that it was clear from the historical background to paragraph 3 of article 10 that the provision laid down a unified rule of law; indeed, the first sentence contained a general rule recognizing that the operator had the right to sell the goods over which he had already exercised his right of retention. The provision could not therefore be interpreted as a conflict of laws rule. He doubted whether any State represented at the Conference would wish the operator, having exercised his right of retention over the goods, to be unable to exercise a right of sale over them, and consequently wish the existing text to be discarded. If the reference to the law of State where the goods were located was not strictly necessary, it might be deleted.

70. Mr. ABASCAL (Mexico) said that his delegation could not agree to the deletion of that reference because it would bring the Convention into direct conflict with some of Mexico's constitutional provisions.

71. Mr. RUSTAND (Sweden) said that in the case of a federal State composed of 50 States, the reference to the applicable law could not possibly have a unifying effect.

72. Mr. ZHAO Chengbi (China) said that if the Convention stated clearly that the operator had the right of sale, it would go a long way towards unifying national laws. If the Committee voted against the German proposal to delete paragraph 3, the Commission's text would clearly need some amendment. He agreed with the Chairman's suggestion that some thought might be given to whether the Committee should maintain the reference to the law of the State where the goods were located.

73. Ms. ZAWITOSKI (United States of America) said that her delegation supported the Chairman's view that if paragraph 3 were retained the phrase "to the extent permitted by the law of the State where the goods were located" might be deleted.

74. Mr. SCHROCK (Germany) said that he did not consider that his question regarding the interpretation of the second sentence had been fully answered. As a judge himself, he considered that any judge who had to decide a case on the basis of the text of that sentence alone, without reference to its history, would be at a loss to know how to interpret the first part of that sentence.

75. Mr. MESCHERYAK (Ukrainian Soviet Socialist Republic) said that the German proposal certainly had its merits and deserved close attention. However, the problems it raised might be solved if the text of the paragraph were made more explicit, although as far as his delegation was concerned the existing text was sufficiently flexible and well balanced.

76. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) said that if paragraph 3 was deleted the sale of retained goods would not be possible because it would not be mentioned. It would then be logical to delete paragraph 4, which stemmed from the idea contained in paragraph 3.

77. The CHAIRMAN invited the Committee to vote on the German proposal to delete paragraph 3 of article 10 (A/CONF.152/C.1/L.16).

78. The proposal was rejected by 21 votes to 9, with 3 abstentions.

79. The CHAIRMAN said that the Committee might now decide whether to amend paragraph 3; delegations might consider the possibility of deleting the phrase "to the extent permitted by the law of the State where the goods are located", although he was aware that that would create serious problems for some States, including Mexico.

80. Mr. SCHROCK (Germany), speaking on a point of order, requested that any amendments proposed to paragraph 3 should be circulated in writing before being discussed.

The meeting rose at 5.35 p.m.